# STATE OF MICHIGAN

# COURT OF APPEALS

---

WILLIAM CHARLES STOVER, Personal Representative of the Estate of CHARLES LOUIS DOLAN, Deceased,

Plaintiff-Appellee,

v

JAMES GARFIELD, D.O., THS PARTNERS I, THS PARTNERS II, and TRANSITIONAL HEALTH SERVICES, INC., d/b/a FENTON EXTENDED CARE CENTER,

Defendants-Appellees,

and

INSURANCE COMPANY OF THE WEST,

Garnishee Defendant-Appellant.

FOR PUBLICATION
September 14, 2001
9:10 a.m.

No. 223196
Genesee Circuit Court
LC No. 96-046002-NO

Updated Copy
December 7, 2001

---

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

SAWYER, P.J.

Garnishee-defendant Insurance Company of the West appeals from an order of the circuit court rejecting garnishee-defendant's motion for summary disposition and requiring garnishee-defendant to cover defendant Dr. James Garfield's obligations under a prior consent judgment with plaintiff William C. Stover, personal representative of the estate of Charles L. Dolan, deceased. We reverse and remand.

The decedent was admitted to Fenton Extended Care Center in March 1994, in an advanced state of illness and age that rendered him incompetent. Defendant Dr. Garfield attended to the decedent at the facility until the decedent's death on April 22, 1994. According to the evidence, Dr. Garfield ordered discontinuation of oral and tube feeding and hydration of the decedent and of treatment for the decedent's pneumonia, several days before the latter's death, relying on instructions from the decedent's wife and her personal representative, neither of whom was legal guardian for the decedent. The nursing home had initiated procedures for acquiring the

decedent's living will from the decedent's family physician but was lackluster in following up on its request. Dr. Garfield testified during his deposition that he knew of no living will associated with the decedent and had not asked about the existence of either a living will or a legal guardian.

The decedent's living will included a section for indicating treatments that the declarant wished not to be provided once death was unquestionably near. The form specifically listed the following examples: cardiac resuscitation, mechanical respiration, and artificial feeding and fluids by tubes. The decedent specified that only mechanical respiration was to be withheld. The document thus strongly implied that the decedent did not consent to the withholding of artificial feeding or fluids by tubes, as was done in his case.

Plaintiff William Stover commenced action on behalf of the decedent's survivors and estate, alleging that defendants improperly withheld food and water from the decedent, in violation of the latter's written directives. Plaintiff openly took pains to avoid characterizing the action as one sounding in medical malpractice, expressly wishing to avoid the requirement of filing an affidavit of merit from a medical practitioner, as required in such actions by MCL 600.2912d. The trial court accepted plaintiff's characterizations and excused that requirement.[1] Count I of the amended complaint alleged intentional misconduct in causing the decedent's death. Count II alleged gross negligence, false imprisonment, assault and battery, and violations of various state and federal statutes. Count III alleged ordinary negligence.

Dr. Garfield had an insurance policy with garnishee-defendant. The policy promised to indemnify and defend Dr. Garfield in matters arising from claims against him in connection with his provision of medical services. The policy additionally capped garnishee-defendant's responsibility for Dr. Garfield's damages at $200,000, and excluded from coverage intentional misconduct and exemplary damages.

Garnishee-defendant initially took responsibility for the defense of this action, while reserving its right to withdraw in the event that a court determined that the claims at issue fell outside the policy's definition of professional services. Then, in response to the trial court's order stating that this was not a medical malpractice case, garnishee-defendant announced that the claims did not implicate the insurance policy and declined to defend the suit further.

Plaintiff and defendants then stipulated the entry of judgment in favor of plaintiff, against Dr. Garfield only, in the amount of $200,000, with interest and costs, to be satisfied solely through the proceeds of the insurance policy with garnishee-defendant. The trial court entered the consent judgment on August 24, 1998.

Plaintiff followed with a motion for garnishment. Garnishee-defendant resisted on the ground that garnishee-defendant had no obligations under the insurance policy, arguing that "professional negligence" was synonymous with "malpractice," and that plaintiff's emphatic

---

[1] The propriety of allowing this case to go forward as something other than a medical malpractice action in the first instance is not an issue on appeal, and so we do not reach it, and express no opinion in the matter.

characterization of the underlying action as something other than one alleging malpractice thus absolved garnishee-defendant of obligations pursuant to professional negligence. Alternatively, garnishee-defendant argued that, to the extent that coverage existed, damages—and thus garnishee-defendant's responsibility for them—should be apportioned according to whether they stemmed from covered or noncovered claims.

The trial court ruled that the insurance contract provided broader coverage than merely for medical malpractice and, therefore, garnishee-defendant erred in deciding to withdraw from its defense of Dr. Garfield. The court additionally held that the amount of the settlement was supportable by any of plaintiff's three theories of recovery, thus obligating garnishee-defendant for the full amount of the judgment without need to allocate garnishee-defendant's obligations according to covered and noncovered claims.

Garnishee-defendant argues that the trial court erred in finding the insurance policy applicable to the claims against Dr. Garfield by its general terms and, alternatively, that if the policy did cover the matter generally, the court nonetheless failed to give effect to specific exclusions within it. This Court reviews contract language for ambiguity, and construes clear contract language, de novo. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999) (ambiguity); *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995) (clear contract language).

Ambiguities in insurance contracts must be strictly construed against the drafter. *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). "[U]nder the rule of reasonable expectation, the court grants coverage under the policy if 'the policyholder, upon reading the contract language is led to a reasonable expectation of coverage.'" *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996), quoting *Powers v DAIIE*, 427 Mich 602, 632; 398 NW2d 411 (1986).

In this case, the insurance policy at issue announces that garnishee-defendant's obligations under the contract extend to covering "*damages* because of a *professional incident* to which this *policy* applies, which results from *your* rendering of, or *your* failure to render, *professional services* in the practice of *your* profession . . . ." (Emphasis in original.) "Professional services" is defined within the contract:

> *Professional services* means the delivery of medical services by the individual Named Insured to a patient as permitted by license as a Medical Doctor or Doctor of Osteopathy. *Professional services* also includes the activities of the individual Named Insured: (i) as a supervisor of the activities of another person who renders medical services to a patient while acting under the direction and control of the individual Named Insured, if the individual Named Insured is legally responsible for the acts and omissions of the other person . . . . [Emphasis in original.]

"Professional incident" is defined as "an act or omission . . . in the furnishing of *professional services* by the individual Named Insured . . . to a patient, that may result in *your* liability for *damages*." (Emphasis in original.)

The question thus becomes whether there can be "professional negligence" arising out of "professional services" or involving a "professional incident" that does not involve "malpractice." For the reasons expressed below, we hold that such concepts are synonymous and, therefore, because it was previously determined that plaintiff's claims did not sound in malpractice, the professional liability policy at issue does not provide coverage for those claims.

We begin by looking at the definition of "malpractice":

> Professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. [Black's Law Dictionary (5th ed), p 864.]

Also of interest to the determination of this case is the Supreme Court's observation in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999):

> In *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647; 438 NW2d 276 (1989), the plaintiff's complaint included allegations that the defendant hospital had failed to supervise and adequately maintain its staff. The plaintiff argued that the trial court erred in granting summary disposition for failure to file the claim within the two-year period of limitation applicable to medical malpractice claims, because the complaint stated a claim for ordinary negligence only, which is governed by a three-year period of limitation. The Court of Appeals affirmed the trial court's order of summary disposition, agreeing with the trial court that the allegations within the plaintiff's complaint involve issues of medical judgment.
>
> "The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. [175 Mich App 652-653 (citations omitted).]
>
> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981); *McLeod v Plymouth Court Nursing Home* [957 F Supp 113, 115 (ED Mich, 1997)].

In other words, if a claim arises out of "professional judgment" or a "professional relationship," then it involves malpractice, not ordinary negligence. Similarly, the "professional liability" policy at issue here refers to coverage involving "professional services." We are satisfied that the clear intent of the language of the policy is to provide coverage for what is commonly referred to as "malpractice" and only for malpractice (i.e., "professional liability").

Therefore, once it was determined that plaintiff's claims in the case at bar did not involve "malpractice," and thus did not have to comply with the statutory requirements imposed on medical malpractice claims, coverage under the policy at issue here no longer applied.[2] Accordingly, the trial court erred in failing to hold that garnishee-defendant had no liability under the policy.[3]

---

[2] It is beyond dispute that plaintiff's claims do not sound in malpractice. First, in ruling on the motion for summary disposition, the trial court acknowledged that there was no malpractice claim:

> Since there is no medical malpractice claim alleged, the plaintiff has no obligation under [MCL 600.2912d] to file an affidavit of merit. Section one of that statute provides that the plaintiffs—or, correction, the first sentence of that section says that the: "plaintiff in an action alleging medical malpractice" that does not fit the case at bar, because plaintiff does not allege medical malpractice. And it is in a medical malpractice claim that an affidavit of merit, by a health professional, is required.

Second, in his brief on appeal, plaintiff continues to disavow that this is a malpractice claim:

> Because the Michigan Medical Malpractice Statutes, and all of its Tort-reform appendages, scrupulously reserves to the medical profession the protection that its members may not be held liable under it without the opinion testimony of a peer that a departure from acceptable practice had occurred, Plaintiff's Complaint avoided reliance on the Medical Malpractice Statute.

[3] As for the arguments raised by the dissent, our dissenting colleague argues that the complaint, despite plaintiff's adamant denials, sounds in medical malpractice. The dissent suggests that we should not rely on plaintiff's representations to determine if the claim sounds in malpractice. We see no justification in rejecting a party's unequivocal representation in order to find a basis to allow the party to win. This is particularly true where, as here, the party's representation was necessary to avoid summary disposition in the first place.

With regard to whether garnishee-defendant breached its duty to defend, the dissent correctly observes that there is a duty to defend a suit if the claims arguably fall within the policy coverage. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000). However, garnishee-defendant did just that: it defended up to the point where the trial court determined that the case did not sound in malpractice. Because, as discussed above, the policy only covered malpractice, garnishee-defendant had no duty to defend a claim not sounding in malpractice. Therefore, it did not breach its duty to defend.

In light of our resolution of the above issue, we need not address the remaining issues raised by garnishee-defendant.

Reversed and remanded to the trial court with instructions to enter judgment in favor of garnishee-defendant. We do not retain jurisdiction. Garnishee-defendant may tax costs.

Griffin, J., concurred.

/s/ David H. Sawyer
/s/ Richard Allen Griffin